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Report of the Fourth International Insolvency Law Colloquium (Vienna, 16-18 December 2013)

Note by the Secretariat

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I. Introduction

1. At its forty-sixth session (2013), the Commission decided that Working Group V should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to micro, small and medium-sized enterprises (MSMEs). The conclusions of that colloquium were not to be determinative, but were to be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work were to be reported to the Commission in 2014.[1]

2. The first three days of the forty-fourth session of the Working Group (16-18 December) were devoted to the colloquium, which considered issues relating to remaining elements of the existing mandate, topics for possible future work and issues already mandated for future work. Following the colloquium, the Working Group convened on 19 and 20 December (the report of the Working Group's deliberations on those two days is contained in A/CN.9/798).

II. Topics discussed

A. Remaining elements of the current mandate of Working Group V

1. Facilitating the cross-border insolvency of multinational enterprise groups

3. The first panel focused on what has been achieved thus far in Working Group V regarding the insolvency of enterprise groups, why part three of the Legislative Guide on Insolvency Law (the UNCITRAL Legislative Guide) focuses on the means of cooperation in the context of international groups, whether additional work could be done, and if so, what that work should be. Some of the specific issues discussed included:

(a) The focus of the recommendations in part three and the reasons for not including recommendations on group centre of main interests (COMI) or a coordination centre, and whether such concepts could now be developed;

(b) Issues such as applicable law and enterprise groups, that while included in the UNCITRAL Legislative Guide recommendations, do not have the same impact as they would if they had been addressed in the Model Law;

(c) The revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency (the UNCITRAL Model Law) and how the COMI factors identified for individual debtors might be applied to enterprise groups;

(d) How the Model Law might be developed to address enterprise groups;

(e) The cultural, legal and commercial differences in insolvency regimes across jurisdictions that lead to different approaches to insolvency and procedural

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 325.

and substantive differences between insolvency laws, creating problems of compatibility, increased costs and making control over all of the entities in the group difficult to exercise and coordinate;

(f) The benefits of speed and simplicity at the time of commencement of an insolvency proceeding (for example, need to avoid potentially lengthy litigation over identification of a parent, especially in groups where there may be more than one or location of the group COMI, etc.);

(g) The advantage of giving broad standing to all group members in proceedings concerning group members; and

(h) Mandating use of the coordination provisions of the UNCITRAL Model Law to ensure their enforceability and the use of protocols (possibly making them legally binding agreements) by the insolvency representatives at an early stage of the proceedings.

4. Consideration of those issues led to the proposal of a range of possible solutions, that might include: legally binding and enforceable pre- and post-commencement cooperation agreements between the various office holders; a focus on head office function rather than COMI or establishment to achieve some level of centralization in appropriate cases; use of synthetic secondary proceedings; use of living wills; greater use of substantive consolidation, reasonably applied; development of the recommendations in part three of the Legislative Guide and the articles of the Model Law into a more enforceable type of instrument; and binding arbitration agreements to deal with specific cross-border disputes.[2]

2. Model law or convention on selected international insolvency issues (including choice of law issues)

5. The second panel focused on that part of the Working Group mandate referring to the possible development of a model law or provisions on insolvency law addressing select international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention. The purpose and benefits of elaborating an international convention on cross-border insolvency were considered, including the benefits of such a treaty as compared with a model law, such as a greater degree of harmonization of law and the binding effect of a treaty. The content of such an instrument might include: granting foreign insolvency representatives access to courts; recognition of foreign insolvency proceedings; cooperation and communication between representatives and insolvency courts; direct competence for the commencement of insolvency proceedings; and applicable law. The starting point for such an instrument would be the UNCITRAL Model Law, along with the recommendations in the UNCITRAL Legislative Guide, taking into account work by relevant international and regional organizations, such as the Hague Conference on Private International Law and the European Union.

6. With respect to choice of law, it was suggested that clear and predictable rules would assist in the administration of cross-border bankruptcy cases in a world where harmonization of bankruptcy procedures is incomplete, and where important local policy choices are influenced by commercial activity. The UNCITRAL Model

[2] See Report of Working Group V (Insolvency Law) on the work of its forty-fourth session, A/CN.9/798, para. 16.

Law, the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) and the UNCITRAL Legislative Guide all seek to implement the administration of a debtor's insolvency across national boundaries through an administratively coordinated case based at the debtor's COMI. This procedural centralization leaves open the issue of which legal questions will be determined by the choice of forum (lex fori) and which will be left to the ordinary choice of law principles (*lex situs*). The Model Law is silent on this question, while the EC Regulation (Article 4) and the Legislative Guide (Recommendations 30-31) take an approach that (while not identical) give fairly broad application to the insolvency law of the debtor's COMI.

7. Recently proposed amendments to the EC Insolvency Regulation suggest that a different approach may be emerging, where the main case is authorized to engage in a choice of law inquiry to locate claims and assets and give effect to the local laws of other jurisdictions where a secondary or ancillary proceeding could be, but has not been, opened. This approach is sometimes called virtual territoriality or a synthetic secondary.

8. Within the current mandate of the Working Group, some adjustments could be made to recommendations 30 and 31 of the Legislative Guide, and an addendum to the Model Law might be considered. As noted above, a convention might include provisions dealing with choice of law. It may also be possible to consider developing a text that would seek to more generally articulate choice of law principles applicable to cross-border cases, again, in consultation with relevant international and regional organizations.

9. A further issue concerned recognition and enforcement of a discharge ordered in foreign insolvency proceedings. It was noted that recognition and enforcement of foreign insolvency-related judgements would be discussed in a later panel.

3. Insolvency of large and complex financial institutions

10. The panel provided an overview of what the Financial Stability Board (FSB) has done and is doing to address obstacles to cross-border resolution, including the development of a framework for expedited recognition of foreign resolution measures, adapted to the new set of tools contained in the FSB Key Attributes of effective resolution regimes for financial institutions (the Key Attributes). That recognition framework, building upon Key Attribute 7.5 and covering both statutory and contractual options, is one of the FSB priorities for work in 2014.

11. The panel also considered developments with respect to resolution tools and recognition frameworks in several jurisdictions. In respect of one jurisdiction's cross-border recognition framework, the panel noted why a recognition regime was important, the parties who might be entitled to seek recognition, the authority competent to recognize, and what might be covered by that recognition. It was also noted that that approach was not inconsistent with the Model Law, but that whereas the Model Law provided for rapid recognition and relief, those characteristics were seldom necessary in the case of banks and financial institutions.

12. Given UNCITRAL's experience in developing the Model Law, which represented a milestone in terms of cross-border recognition, it was suggested that UNCITRAL might have an important role to play in sharing and disseminating information on, and possibly developing and promoting, a broadly acceptable model

for recognition of cross-border insolvency of financial institutions and in ensuring consistency between insolvency regimes generally and insolvency regimes for bank and financial institutions.[3]

4. Obligations of directors of enterprise group companies in the period approaching insolvency

13. Some of the issues considered in the context of the obligations of directors of enterprise group members in the period approaching insolvency included whether: (a) directors should be allowed to pursue the group interest in the vicinity of insolvency, or only the interests of their own entity; (b) pursuing a group interest could be regarded as a possible step to minimize or avoid insolvency in accordance with recommendations 255-256 of part four of the Legislative Guide; (c) directors could use the group context as a defence against a wrongful trading claim; (d) the steps required of directors or controllers by part four of the Legislative Guide in the vicinity of insolvency would be sufficient when considering certain group managerial structures; (e) harmonization (of directors' obligations in a group context) would be desirable; and (f) conflict of laws aspects could be addressed.

14. Some of the background factors to be taken into account in considering these issues included: (a) the interaction between multiple entities of an enterprise group; (b) the potentially conflicting business purposes of different group members; (c) divided loyalties among members of the group; (d) the potential personal liability of a director acting for a member of the group; (e) intersection of civil and common law; (f) distinctions between independent directors and those with ownership interests; and (g) the importance of adopting solutions that promote trade and commerce.

15. Various ways of approaching these problems were suggested including: (a) adopting the approach in part three of the Legislative Guide of taking account of various factors associated with the group context, such as those indicated with respect to avoidance of intra-group transactions, procedural coordination and conflicts of interest where one insolvency representative is appointed to multiple insolvency estates; (b) considering the solutions provided in part four of the Legislative Guide where companies related to the debtor can be considered shadow or de facto directors;[4] (c) adopting an approach that would enable those whose interests are at stake in insolvency (e.g. creditors) to monitor and influence the behaviour of controlling entities and those in control of those entities in order to better align their mutual interests; (d) adopting different ways of addressing conflicts of duties by allowing conflicted directors to resign or to follow the guidance of their controlling entity and not be exposed to liability if they do so; (e) identifying situations in which a business judgement rule should operate in order to promote the idea that relatively prudent behaviour will be protected; and (f) revisiting the recommendations in part four of the Legislative Guide to see how they might be adjusted to address enterprise groups.[5]

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[3] Ibid., paras. 21-22.

[4] UNCITRAL Legislative Guide, part four, chap. II, paras. 13-16.

[5] See Report of Working Group V (Insolvency Law) on the work of its forty-fourth session, A/CN.9/798, paras. 23 and 30.

B. Possible future work

1. Issues relating to creditors and claims

Part 1: Treatment of priority and "unusual" cross-border claims

16. A number of issues with respect to cross-border priority claims were discussed, including: (a) whether a universalist or a territorial approach should be adopted (e.g. whether priority claims against a company located in and subject to insolvency proceedings in a foreign jurisdiction should be admitted in those proceedings even though the claims do not originate in that jurisdiction; and if they are allowable claims, whether they should be afforded the ranking accorded in the jurisdiction in which they originated); (b) balancing the competing interests of foreign priority creditors and local creditors (e.g. how an admissible claim with a particular ranking in one jurisdiction would be treated in another jurisdiction where the same claim would be inadmissible or have no priority); (c) how unexpected claims might be addressed, especially if they were so large as to exhaust the insolvency estate; and (d) the injustices that would occur or advantages that would be lost if cross-border priority issues were not resolved.

17. Possible solutions included establishing a universal set of priorities; recognizing foreign priorities in local proceedings unless contrary to public policy; marshalling assets to one main proceeding, where a group trades as a single entity (e.g. as in the cases of *Nortel Networks* and *Lehman Brothers*); ignoring the separate legal status of group members and treating the group as a single enterprise; and leaving it up to local law and considerations.

Part 2: Relative voting rights of debt and equity holders and the impact on forum selection

18. Five elements were discussed, the first being shareholder approval problems. These included: inconsistent rules for plan approval might apply in parallel proceedings concerning a single entity and in proceedings pending in different jurisdictions concerning multiple members of the same group. The second element was problems associated with cramdown provisions, for example: a law with stronger cramdown and lower barriers to cramdown would give leverage to the plan proponent (often the debtor) and a law with no provision for cramdown would require unanimous consent of all creditors, and thus give complete power over the terms of reorganization to any holdout creditor. The third element was secured creditor participation where insolvency regimes adopt different approaches to: imposition of a "stay" on secured creditor enforcement actions, realization of property subject to secured claims by the insolvency estate, and alteration of the rights of secured creditors. The fourth element was different approaches to insider subordination; many jurisdictions treat insider claims by subordinating their recovery rights below the rights of unsecured creditors, and some jurisdictions automatically treat insider creditor claims as equity claims. The final element was the participation of creditors who would not receive any distribution in the insolvency ("out of the money" creditors), given that some regimes do not permit them to vote on plans, and others do not permit them to object to certain actions.

19. The panel noted that all of these elements can influence forum selection, which may allow some stronger creditors to maximize their potential for recovery at

the expense of a much larger constituency of other stakeholders. It was suggested that forum selection might be addressed through a number of means including: harmonizing the elements that tend to affect forum selection most critically; setting international standards for forum selection; and rewarding or punishing forum selection choices.

Part 3: Coordinating creditor access to information and representation

20. A common goal among insolvency regimes is maximizing creditor recoveries. A related goal is, or should be, providing creditors access to information to allow them to participate and protect their interests in a proceeding. It was suggested that approved creditor committees could play a beneficial role in providing greater access to information for all creditors, presenting issues of similarly situated creditors and increasing efficiency.

21. Various additions to recommendations 126-136 of the Legislative Guide were proposed to provide more information on notice to creditors, both known and unknown (e.g. concerning opening of proceedings, location and value of assets, status of proceedings, disposition of assets and payment of claims), cooperation (e.g. between insolvency representatives and creditors or creditor representatives, and in concurrent proceedings where creditor groups exist, between creditor groups), and access to insolvency regimes (e.g. ease of creditor access to administrators or courts to assert claims or issues, and ensuring consistency and simplicity of procedures for filing creditor claims). A further issue concerned representation of creditors by insolvency representatives, including the right of the insolvency representative to lodge claims and vote in domestic and foreign proceedings. Addition of further material to the Guide to Enactment and Interpretation concerning article 27 of the Model Law to address some of these concerns was also thought to be appropriate.[6]

2. The insolvency treatment of financial contracts and netting

22. The panel presented the work of several international organizations with respect to close-out netting, including the Unidroit Principles on Close-Out Netting and the relevant aspects of the FSB Key Attributes of effective resolution regimes for financial institutions, as well as the impact of close-out netting on risk management and systemic risk. The relevant recommendations of the UNCITRAL Legislative Guide were compared to the Unidroit Principles, and it was noted that the approach adopted by the recommendations of the Legislative Guide was much wider and unrestricted than that of the Principles (e.g. the Legislative Guide does not limit who may be party to a financial contract, whereas the Principles exclude natural persons acting primarily for personal, family or household purposes). Since the global financial situation has changed significantly since the adoption of the Legislative Guide in 2004, particularly as a result of the 2008 global crisis, it was suggested that that approach may no longer represent best practice. Moreover, because the recommendations of the Legislative Guide (together with the World Bank's Principles for Effective Insolvency Systems) form the international standard used by the World Bank and International Monetary Fund in assessing national insolvency regimes, it is of particular importance that those recommendations

[6] Ibid., paras. 25 and 30.

represent current best practice. It was suggested that the relevant parts of the Legislative Guide be updated in light of these factors and of work carried out in the interim by other international organizations.[7]

3. Regulation of insolvency practitioners

23. The panel presented the Insolvency Office Holder Principles prepared by the European Bank for Reconstruction and Development (EBRD), and discussed why countries would benefit from implementing the Principles and how they might do so. It was noted that studies suggest a strong correlation between the qualifications of insolvency practitioners and insolvency regimes with higher returns to creditors, as well as higher levels of available credit and better performance by courts in insolvency matters. Experience with implementation of the EBRD Principles suggests that because different countries have different needs, especially where public institutions are broken and the private sector lacks expertise, there may be a range of different ways of improving the quality of insolvency professionals, from developing codes of ethics to State-sponsored licensing and disciplinary regimes. Examples were cited of some of the problems encountered in insolvency proceedings, particularly in the cross-border context, in which inexperienced and unqualified insolvency practitioners had been appointed. The EBRD Principles, together with other work by relevant international organizations (e.g. International Association of Insolvency Regulators and the World Bank), might serve as a reference for expanding the existing material in the Legislative Guide to provide a basis for countries to prepare appropriate regulatory regimes. It was indicated that this might be a topic that could be developed informally by a group of experts before being considered by the Working Group.[8]

4. Enforcement of insolvency-derived judgements

24. The panel discussed a recent judgement of an English court concerning the recognition and enforcement of foreign insolvency-derived judgements (specifically, transaction avoidance) under the Model Law, the position likely to be taken by the courts in another country, the position under the EC Insolvency Regulation with respect to that issue, as well as the position in Europe with respect to recognition of non-European decisions. Although the English decision has created some uncertainty as to whether such recognition and enforcement is covered by the Model Law, in other jurisdictions the approach taken by the courts has been more flexible and has recognized that the traditional rules for recognition and enforcement of insolvency-derived judgments must adapt to changing conditions.

25. Some concern has been expressed that the judgement may limit the effectiveness of the Model Law and weaken arguments for its adoption; that it seems inconsistent to recognize the foreign proceedings and the appointment of the insolvency representative, but not to recognize insolvency-derived judgements; that the approach may spread to other insolvency-derived judgements; and that it marks a retreat from the modified universalism of the Model Law. The panel noted that such judgements would be recognized and enforced under the EC Insolvency

[7] Ibid., paras. 26 and 30.

[8] Ibid., paras. 27 and 30.

Regulation; outside the EC Regulation, the position in Europe varies with respect to recognition of non-European decisions.

26. It was suggested that article 21 of the Model Law might be amended so that it is clear that the discretionary relief the court can grant in aid of foreign insolvency proceedings includes the ability to recognize and enforce an "insolvency-derived" judgement of a foreign insolvency court. Another view was that the problem could probably be confined to the particular jurisdiction and did not require a general solution.[9]

5. Insolvency treatment of intellectual property in cross-border insolvency cases

27. The panel noted that intellectual property is becoming increasingly important in insolvency cases, and in some instances those rights constitute the majority of the assets of an insolvent company. Even where the intellectual property does not constitute a large portion of the assets, the intellectual property rights may be critical to the ability of the debtor to function. However, if the debtor is the licensor of intellectual property rights and can terminate the rights of licensees, the termination of those licences may have major ramifications as the whole chain of licensees and their suppliers and other creditors will be affected.

28. The panel considered differing approaches to various issues focusing on what happens to the rights and obligations of licensees and licensors of intellectual property upon commencement of the insolvency of either of them in a number of different jurisdictions and pursuant to current guidance found in the Legislative Guide on Insolvency Law and the Supplement on Security Rights in Intellectual Property to the UNCITRAL Legislative Guide on Secured Transactions. It was noted that while the work UNCITRAL had done to date had addressed some of the issues to some extent, neither of those texts included recommendations on specific intellectual property issues in insolvency.

29. Since intellectual property is the type of property that easily crosses national borders, it was suggested that harmonization of the treatment of intellectual property rights in insolvency proceedings should be addressed. The treatment of intellectual property rights in multinational insolvencies is complicated by differences in the underlying intellectual property law. The impact of several court decisions in cross-border insolvency cases involving questions of intellectual property law formed part of the discussion. Treatment of intellectual property rights in the enterprise group context is also an issue; for example, one subsidiary may own the intellectual property rights of the entire group. It was noted that the Legislative Guide adopted a general approach to relevant topics, for example, the treatment of contracts in insolvency, and did not provide detailed treatment for specific types of contract or on possible exceptions to those general rules. On that basis, it was questioned whether detailed treatment for intellectual property contracts in the Legislative Guide was appropriate.[10]

[9] Ibid., paras. 28 and 30.
[10] Ibid., paras. 29 and 30.

C. Mandated future work

Expedited, simplified proceedings, including pre-packs and other mechanisms suitable for the insolvency of MSMEs

30. The panel noted that the Working Group already had a mandate to conduct, at its forty-fifth session in April 2014, a preliminary examination of relevant issues, and in particular to consider whether the Legislative Guide provided sufficient and adequate solutions for MSMEs. If it did not, the Working Group had been requested to consider what further work and potential work product might be required to streamline and simplify insolvency procedures for such enterprises. The panel presented an introduction to the global landscape for MSMEs, including their importance and prevalence in most economies, as well as some of the challenges they face, including their vulnerability to financial distress and reduced access to credit, markets, skills, infrastructure and government services.

31. The panel went on to consider MSME exit mechanisms, including the importance of such mechanisms, the key challenges faced in devising effective mechanisms, including means of funding those mechanisms, and possible solutions, noting the need to address the stigma often associated with insolvency in the MSME context. Elements of possible solutions identified included: discharge, fresh start, speed, low cost, simplicity and flexibility, as well as the need for the support of other laws, such as tax laws, an appropriate institutional framework, and possible use of informal mechanisms. Reference was made to one jurisdiction, which had given particular consideration to developing provisions tailored to MSME insolvency. Related measures such as the establishment of assistance and information centres for MSMEs, such as debt advisory services, were also noted.

III. Summary and conclusions

32. The colloquium concluded with a summary of the issues considered by each panel. Many of the problems associated with each of the topics covered by the panels had been clearly identified together with, in some instances, possible solutions. It was noted that there were significant synergies between various topics, that some of the same issues (e.g. choice of law) had emerged with respect to numerous topics, and that there was a need for the work of UNCITRAL to continue to reflect the most current best practice, even if that meant that existing texts had to be updated to respond to changed and changing circumstances. Moreover, some of the issues to be addressed were certain to require creative and forward thinking to keep pace with commercial reality, much like what went into the conception and preparation of the Model Law in the 1990s. Enterprise groups, for example, challenge traditional ways of thinking about business structures. In many instance, it was suggested, enterprise groups cannot realistically be regarded as collections of individual entities. Rather, they operate as single enterprises that are arranged as groups of individual corporate entities only to take advantage of current tax and other business realities. New ways of thinking needed to be developed in order to address the impact of the insolvency of such groups. It was noted that some of the topics discussed would require the Working Group to coordinate its efforts with those of other relevant international organizations.

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Planned and possible future work — Part II

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IV. Allocation of resources and prioritization (continued from document A/CN.9/807)

B. Activities to support the adoption and use of UNCITRAL texts

57. The following paragraphs will refer to the provision of technical assistance, promoting the uniform interpretation and application of UNCITRAL texts, coordination and cooperation with other relevant bodies in promoting and using UNCITRAL texts, and promoting the rule of law at the national and international levels. For convenience, the shorthand term "support activities" will be used to refer to all such activities collectively. Document A/CN.9/752 provides further details of past and ongoing support activities (paras. 41-51).

58. The report to the Commission for this session on "Technical cooperation and assistance" (document A/CN.9/818) summarizes the benefits of technical assistance, many of which apply to support activities as a whole. As the Commission has noted, engaging in support activities is a core part of UNCITRAL's mandate to harmonize international trade law (see, further, A/CN.9/752, para. 3). The Introduction to that report notes that support activities have been recognized and endorsed by the Commission and the General Assembly: the General Assembly also stated that they represent one of UNCITRAL's priorities, and encouraged steps to be taken to facilitate such work (document A/CN.9/818, para. 1 and footnote 1). The Commission is also referred to the other reports on support activities in the year to this Commission session listed in paragraph 7 of document A/CN.9/807.

59. Document A/CN.9/752 also notes that almost all such activities are undertaken through the Secretariat A/CN.9/752 (para. 57). As previously agreed by the Commission (A/CN.9/774, paras. 39-42, A/68/17, para. 307), and as further related at several places in the reports for this session referred to in the previous paragraph, the demand for such activities far exceeds the resources available in the Secretariat to meet it.

60. Indeed, in its forty-fifth session, the Commission noted that consequences of UNCITRAL's focus on legislative activity included a general lack of Secretariat staff and resources for support activities, including the servicing of existing texts, and a lack of Secretariat expertise to service some UNCITRAL texts (A/CN.9/752, paras. 56-60, also citing A/66/17, para. 257). If the Commission seeks to increase legislative activity as a whole through greater use of informal working methods, there is a risk that the resources available for support activities will be further reduced, and these consequences may be exacerbated.

61. One approach to mitigate these risks, which the Commission may wish to take up, would be to reconsider the generally swift move from adoption of one legislative text to the next topic for legislative development also noted in A/CN.9/752, paragraph 56. Also applying the suggestion that there could be a pause in legislative development through formal methods in some circumstances (see para. 39 of document A/CN.9/807), the Commission could build a pause between the completion of a text and commencement of work to develop a further text into UNCITRAL's legislative activity. So doing could allow time to focus on promotion of the recently-completed text and other support activities, such as identifying a strategy for promotion of a text and developing promotional materials (A/CN.9/752,

para. 62 (c)). Such a pause could also, as noted in paragraphs 40-45 of document A/CN.9/807 above, allow for the more regular turnover of subject areas and working groups, with the potential benefits noted above, and allow UNCITRAL to achieve an appropriate balance between developing new texts and administering existing texts (the need for which was noted in A/CN.9/752, para. 58).

62. Nonetheless, the Commission may consider that there will remain insufficient resources in the Secretariat for the optimum level of support activities.

63. Document A/CN.9/752, in considering this point, highlights several issues that the Commission may wish to consider to enhance the use of existing resources, including the need:

(a) To develop more efficient ways of delivering technical assistance, including the greater use of videoconferencing, online training and other communications technologies, and of alternative tools for the promotion of texts (such as issuing practice guides), in order to reduce the need for Secretariat travel and associated expenses;

(b) To define a more active role for the Commission and member States in delivering that assistance;

(c) To engage in outreach activities and better communication on the mandate and work of UNCITRAL with decision makers on trade law at the national and regional levels, perhaps through the formation of a support activities or strategic planning committee within the Commission; and

(d) For a technical assistance programme to reflect the different needs of different UNCITRAL texts and varying strategies to promote them as a result (A/CN.9/752, paras. 59-62).

64. The Commission has also heard setting priorities in subject areas (which would also be applied to support activities) would enable the Secretariat to take a more proactive role in defining and shaping a programme for technical assistance and other support activities (A/CN.9/752, paras. 56-58, citing A/66/17, para. 257).

65. Clearly, however, it is unlikely that the Secretariat would have adequate resources to implement such a programme. The Commission may recall that most support activities are not covered by the regular budget (A/CN.9/775, para. 89). Recognizing this, documents A/CN.9/752 (e.g. paras. 59-62) and A/CN.9/774 (e.g. paras. 43 and 44) made some suggestions as to ways to increase the resources available to the Secretariat, including:

(a) Developing more strategic partnerships and cooperation activities with other relevant bodies;

(b) Promoting increased awareness of UNCITRAL texts within the United Nations system, among bilateral and multilateral donors and among States, and encouraging them and non-governmental organizations to take a greater role in support activities; and

(c) Using working groups and the Commission as resources to identify appropriate expertise, and setting aside time at UNCITRAL meetings for the discussion of States' support for the implementation and use of UNCITRAL texts.

66. The Commission may consider that additional resources, from external sources, would also be necessary. The Commission has heard reports of existing in-kind contributions and contributions to the UNCITRAL Trust Fund for Symposia and to grant travel assistance to developing countries that are members of UNCITRAL, but that these additional resources are insufficient to address the needs concerned (A/CN.9/775, paras. 89-100). In addition to appealing for additional contributions, the Commission may wish to instruct the Secretariat to set aside time and resources both to develop a support activities programme for the medium-term and to seeking external resources to fund it, and that the Secretariat should report on the results of efforts in this regard at its next session.

67. The Commission noted at its forty-fifth session, in 2012, some preliminary proposals that could delineate the scope of a support activities programme so that it would involve an integrated approach from preparation for a legislative text through to technical assistance and monitoring of adopted texts (A/67/17, para. 230).

68. Elements suggested at that session, and other support activities could include:

(a) Hosting conferences, workshops or seminars, and issuing publications, to raise awareness and promote understanding of key legislative instruments, including developing practice guidelines for judges;

(b) Attendance at workshops, conferences and seminars related to existing UNCITRAL texts;

(c) Formalizing networking by creating a virtual list of participants that would allow experts to "meet" and exchange information, as well as help States that needed assistance to identify experts in the field;

(d) Partnering with other relevant bodies, such as those described above, to encourage them to include support activities for UNCITRAL texts into their own main activities and highlighting the role of the latter in helping States attract foreign trade and investment (A/67/17, para. 230); and

(e) Secretariat provision of advice, assistance and training to a wide range of potential users on UNCITRAL texts.

69. It will be evident that the resources needed for such activities would go beyond additional human resources, so that they could finance the production of additional materials for promotion and training (including the upgrading of the UNCITRAL website as the primary medium for dissemination of information), the hiring of expert consultants and the travel for the purpose of support activities.

70. Donor agencies would require indications of success in support activities. Here, the Commission may wish to consider whether the adoption of UNCITRAL texts alone would be too narrow a measure of success, and that ways to demonstrate the use of UNCITRAL texts by donor agencies and States should be developed.

71. The Commission may also wish to consider whether a support activities programme would, where adequately resourced, be able also to ensure that informal working methods can operate effectively, including as regards the maintenance of expertise in subject areas on the part of Secretariat staff, experts and that gained through participation in working groups. In this regard, a support activities programme could also underpin the potential benefits of the move between informal

and formal working methods, without jeopardizing the maintenance of this necessary expertise.

72. A key feature of such a support activities programme would be partnering with other relevant agencies, such as Unidroit and the multilateral development banks, to identify possible future topics for joint activities. The Commission may wish to consider whether to instruct the Secretariat, as part of the development of such a programme, to coordinate with those bodies to identify such topics.

V. Conclusions

73. Taking all these elements together, the Commission is invited to:

(a) Decide on the subject areas and possible texts in which legislative development should be undertaken using formal working methods during the period to the next Commission session, in 2015;

(b) Allocate the twelve weeks of conference time available to working groups accordingly, subject to any conference time to be devoted to colloquia and to any other recommendations for the conference time available for meetings of UNCITRAL and its working groups (up to sixteen weeks per annum);

(c) Decide on the extent to which legislative development should be undertaken using informal working methods in subject areas and for future texts during the period to the next Commission session, in 2015, if any;

(d) Decide whether conference time should be allocated to one or more colloquia during that period; and

(e) Decide on the subject areas and possible texts for which it is tentatively planned to engage in legislative development in the three to five years following that Commission session, and provide an indication as to the extent to which the legislative development will be undertaken using formal and/or informal methods; and

(f) Decide whether the Secretariat should engage in developing a support activities programme, and report to the Commission on progress at its forty-eighth session;

(g) Make such recommendations to the General Assembly or otherwise as to resources (including conference time, Secretariat staff and other resources) as the Commission may see fit.

ADDENDUM

POSSIBLE FUTURE WORK IN ARBITRATION — CONCURRENT PROCEEDINGS

I. Introduction

1. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission considered work that could be recommended in the field of international arbitration.[1] In that context, it was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief. It was further said that addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. Some delegations observed that the issue of concurrent proceedings was in such flux that developing a harmonized approach at the present time might be premature.[2] The Commission was informed that the International Arbitration Institute (IAI, Paris), the Geneva Centre for International Dispute Settlement (CIDS) and the Secretariat jointly organized a conference on that topic on 22 November 2013, and that the Secretariat would report to the Commission on issues identified at that conference.[3]

2. The purpose of the present note is to briefly introduce the practical issues raised by concurrent proceedings in investment arbitration, as presented during the Conference mentioned above[4] and the possible means to reduce the instances of concurrent proceedings. This note does not address parallel proceedings in commercial arbitrations.

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 129-133 and 311.

[2] Ibid., para. 131.

[3] A/CN.9/785, para. 18.

[4] This note is based on the following documentation: *Concurrent Proceedings in Investment Disputes*, IAI Series No. 9 (E. Gaillard and D. Reich, eds., 2014); "*Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently*", Final Report of the Geneva Colloquium held on 22 April 2006, Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue; "*Investment treaties as corporate law: Shareholder claims and issues of consistency: A preliminary framework for policy analysis*", David Gaukrodger, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division; "*Admissibility: Shareholder claims*", in The International Law of Investment Claims, Zackary Douglas; "*Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*", Robin F. Hansen, The Modern Law Review, Vol. 73, No. 4, July 2010; *Parallel Proceedings in International Arbitration*, Bernardo M. Cremades and Ignacio Madalena; "*The coordination of Multiple Proceedings in Investment Arbitration*", Hanno Wehland, Oxford International Arbitration Series.

II. Issues relating to concurrent proceedings

A. Definition and types of concurrent proceedings

3. Multiple or concurrent judicial proceedings arising out of an investment are perceived as an increasingly problematic issue in the field of investor-State disputes.

4. However it is notable that a universal definition of "concurrent proceedings" does not exist in practice, and that for the purposes of any possible future work in relation to the perceived problems arising out these proceedings, a working definition would need to be agreed. Concurrent proceedings in this note refers to situations where more than one claim is filed against a State pursuant to an investment treaty, and where such claims involve substantially related parties, irrespective of their location, in relation to the same or substantially identical measure or measures taken by that same State. However it is notable that different legal bases exist for assessing whether more than one claim against a State amounts to "concurrent proceedings". This note does not purport to set out a comprehensive analysis in that respect.

5. The complexity of multinational corporate structures, the structures of investments themselves and the nature of contractual and treaty-based relationships between parties necessarily lead to a number of forms in which concurrent proceedings can arise. Several of these are set out below (under paras. 7 to 13).

6. Notably, although issues arising from the initiation of proceedings by substantially different investors (rather than related investors) (i) against the same State, in relation to the same State measure and the same applicable provisions of an investment treaty, or (ii) under different investment treaties, in relation to the same State measure, may both lead to similar disadvantages as in concurrent proceedings more strictly defined (for example, inconsistent jurisprudence), those categories of proceedings are not addressed further in this note.

Different instruments: contract claims, and investment claims under investment treaties

7. A number of different sources of law may confer rights upon investors and obligations on States. Contract and treaty obligations, for example, provide discrete bases for a substantive claim (with often different applicable substantive law), but a single measure from a host State can give rise to both a contract and a treaty claim.

8. The breach of a contract between an investor and a State may also serve as an indication that the treaty has been breached, and in some instances, umbrella clauses in investment treaties can premise a breach of a treaty on a contractual breach. However, the two are not necessarily codependent, and a contract claim and a treaty claim based on the same measure can be brought in different fora and under different substantive laws, even though the parties might be substantially the same and seeking substantially the same relief.

Different actors: investor comprised of multiple entities with standing

9. Investments are often structured through a number of different legal entities, more than one of which may be in a position to bring a claim against a host State.

10. A right of action has been consistently established in current investment arbitration where shares in the local company can show damage resulting from a State measure. Treaties typically protect the shares themselves as a "protected asset" and consequently even minority shareholders in a local company have been held to be protected against the loss of their share value under an investment treaty.

11. Indirect ownership of assets in the host State has also been deemed to gain protection under investment treaties, as have shareholders and indirect investors further down the corporate chain.

12. Other treaties may provide a broad definition of "investor", such that a locally incorporated but foreign-controlled or foreign-incorporated company may be considered an investor, thus expanding the number of entities with standing under a given investment treaty.

13. Consequently, a number of different entities within the same corporate structure may have a right of action in relation to the same investment and against the same State measure, as long as all of them qualify as investors under an applicable treaty.

B. Issues raised by concurrent proceedings

14. Concurrent proceedings are typically perceived as detrimental in investment treaty practice, which serves to undermine confidence in investment treaty arbitration.

15. Many criticisms of the practice of parallel proceedings relate to the possible breach of overarching principles of good faith and procedural fairness in the practice of international law. A number of specific criticisms can be described as follows.

16. First, where parallel proceedings are brought, a State must defend several claims in relation to the same measure, with potentially the same economic damage at stake, leading to a waste of resources and unnecessary costs.

17. Second, there is a risk of multiple recovery when claimants within the same corporate structure, but with distinct legal identities, claim on the basis of those separate identities in relation to the same or substantially the same damage.

18. Third, as with commercial arbitrations, concurrent proceedings in relation to the same State measure may result in inconsistent or contradictory jurisprudence. Parallel proceedings have likewise been criticized for inconsistent rulings on facts.

19. From a policy perspective, it may be considered that the existence or even the risk of concurrent proceedings might create some dissatisfaction for users of investment treaty arbitration and undermine predictability more generally.

C. Possible future work in the field of concurrent proceedings

20. A number of options might be considered as a means to harmonize the approach of disputing parties, treaty Parties or arbitral tribunals in relation to concurrent proceedings, and to reduce the negative consequences that can result

from those proceedings. The Commission may wish to consider that, in order to provide efficient results, certain options below would require a close cooperation with arbitral institutions active in the field of investment arbitration to devise any possible instrument.

Guidance to arbitral tribunals in relation to a *lis pendens* or res judicata principle

21. A matter for consideration might be the development of a standard or guidance in relation to the availability of concepts of res judicata or *lis pendens* within the realm of investor-State disputes.

22. Unlike in civil law or common law litigation proceedings, traditionally the concept of *lis pendens* has not been applied in international arbitration; an arbitral tribunal seized second in time with the same matter as another arbitral tribunal previously seized nonetheless has exclusive jurisdiction pursuant to the arbitration agreement conferring that jurisdiction. Nonetheless, *lis pendens* and res judicata are principles that are recognized in public international law and thus may be referenced as part of the *lex causae* of an investment dispute. In the often cited *Lauder v. Czech Republic* and *CME Republic BV v. Czech Republic* cases, the tribunal acknowledged the potential problem of conflicting awards, and that the second deciding court or tribunal could take the first decision into account when assessing final damage.

23. A *lis pendens* rule in the context of civil litigation proceedings is set out in Article 27(1) of the Brussels Regulation 44/2001 ("Brussels Regulation"), which provides that: "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."

24. In the context of investment treaty arbitration, determining the "same parties" for the purposes of such a rule could present a challenge. The Brussels Regulation (Article 28) also sets out a discretionary rule for "related actions": "1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in questions and its law permits the consolidation thereof. 3. Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings."

25. Matters that could be considered in this respect include: (i) whether devising guidance for a *lis pendens* rule in the same or related investment proceedings would be a means to harmonize international practice and reduce the occurrences of parallel proceedings in investment arbitration; (ii) the form such guidance could take, and in particular whether a standard would need to be contained in the underlying investment treaty; and (iii) whether such a standard is appropriate as between national proceedings and investment arbitration proceedings. Staying a second-in-time proceeding whilst a related proceeding is pending in a different forum is also a possible means to redress the difficulties arising from concurrent

proceedings, and might better be considered as a matter of judicial comity, further addressed below.

26. It could be considered whether guidance or a definition of "same parties" and/or "related proceedings" could in any event be useful for the establishment of a harmonized standard in relation to concurrent proceedings.

Consolidation

27. Another matter for further consideration, albeit with its own legal and logistical complexities, that might serve to reduce the frequency of parallel proceedings, is the introduction of consolidation provisions in treaty text or in arbitration rules. Such provisions would provide a legal basis for consolidation.

28. As an illustration, the United States Model Bilateral Investment Treaty (2004) provides for requests for consolidation where "two or more claims ... have a question of law or fact in common and arise out of the same events or circumstances ..." — and other solutions, such as that contemplated by the OECD Negotiating Group on Multilateral Agreement on Investment (MAI; negotiated between 1995-1998, and discontinued), the text of which provided for a provision on consolidation of multiple proceedings (article 9). In the MAI, it was suggested that a separately constituted arbitral tribunal would be empowered to determine whether to consolidate all or part of the multiple proceedings.

29. Matters to be considered in relation to the design of a consolidation regime include the question of parties' consent to consolidation, the nature of the decision to consolidate if made by the arbitral tribunal, due process, consolidation of proceedings for parallel arbitrations arising under different treaties.

Coordination and exchange of information among arbitral tribunals

30. International judicial comity is another area which may provide a mechanism for the coordination of multiple proceedings. A matter for consideration could be whether existing UNCITRAL texts, for example the Model Law on Cross-Border Insolvency (New York, 1999) (the "Insolvency Model Law"), which provides for cooperation in relation to concurrent litigation proceedings in the matter of insolvency, could provide a model for a legislative text in the field of investment arbitration.

31. The Insolvency Model Law provides for cooperation and direct communication between the courts of different countries, or courts and administering institutions in different countries, in respect of concurrent proceedings involving the same debtor (articles 25-26); rules on the commencement of a local proceeding involving the same debtor when a foreign proceeding has previously commenced (article 28); rules concerning coordination of concurrent proceedings, particularly with respect to the granting of relief (articles 29-30); rules seeking to avoid double recovery in situations where concurrent proceedings involving the same debtor are taking place in different jurisdictions (article 32); and a basic factual presumption that the existence of a foreign proceeding in relation to that debtor is proof, absent evidence to the contrary, that the debtor is insolvent (article 31). The Insolvency Model Law is premised on the notion of the same debtor being subject to insolvency proceedings in multiple jurisdictions. Also noteworthy is the Practice Guide on Cross-Border Insolvency Cooperation which

provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. It illustrates how the resolution of issues and conflicts that might arise in those cases could be facilitated by cross-border cooperation, in particular through the use of cross-border insolvency agreements, tailored to meet the specific needs of each case and the requirements of applicable law.

Definition of investor; limiting parties with standing

32. Commentators have suggested that investment treaties should clearly set out what level of indirect ownership is required for a shareholder to acquire standing under an investment treaty, and that such clarity could help to reduce parallel proceedings in situations where the same parties (related by control) initiate proceedings under different treaties in relation to the same State measure.

33. A matter for the consideration might be whether guidance could be developed in relation to harmonizing a standard of corporate nationality, or creating model clauses for investment treaties to clarify investor standing under a treaty.

34. The UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide") observes that the laws of different jurisdictions vary in respect of the extent to which a law allows the veil of incorporation to be lifted, but that it is common for insolvency laws to address issues of intra-group liability in corporate groups on the basis of the relationship between the insolvent and related group companies in terms of both shareholding and management control (see part three, chapter I, paras. 26-30). It cites as an alternative to direct regulation of corporate groups the need to include sufficient definition in the relevant law to allow application of the relevant provisions to corporate groups, for example by establishing the subordination of "related parties".

III. Concluding remarks

35. The Commission may wish to consider whether UNCITRAL should hold a colloquium to consider further the matters highlighted in this note, including:

- The definition of the various issues at stake and whether those issues can be dealt with at a multilateral level;
- The matters to be covered in any instrument addressing concurrent proceedings;
- The form(s) such instrument(s) could take;
- The actors to be involved in the design of any possible solutions to that issue.